TAN WEE CHOON

v.

ONG PECK SENG & ANOR.

HIGH COURT MALAYA, MALACCA
WAN YAHYA J
[CIVIL SUIT NO. 25 OF 1983]
7 MARCH 1985

TORT: *Trespass - Whether damage must be proved.*

LAND LAW: *Equitable right of way - Whether right could be acquired through long use.*

The plaintiff was seeking a declaration that he was entitled to the exclusive possession and enjoyment of his land; an injunction to restrain the defendants from trespassing on the land; an order that the defendants pull down and demolish a wooden shed erected on the plaintiff's land; damages and costs. The plaintiff had bought his land in 1981. Right in the centre of the land there existed a path, which was used by the defendants as access to their house. Some time after taking possession of the land, the plaintiff fenced the entire area but the fence was pulled down by the 1st defendant who continued to use the path. The plaintiff claimed that the 1st defendant threatened his workmen who erected the fence with the use of force. The defendants however contended that no trespass had been committed as no damage had been proved and that they had an equitable right of way acquired through long use.

Held:

[1] Trespass had been committed by the defendants. Damage did not have to be proved to establish trespass. Even if damage needed to be proved, there was sufficient evidence of damage caused to the plaintiff for the Court to find trespass.

[2] No right of way existed in favour of the defendants. Rights and interests incidental to land tenure have been expressly provided for in ss. 282 to 288 under Chapter 17 of the National Land code 1965, by way of registration. In the present case no right was registered. In any event the 1st defendant's right of way commenced only after 1979. Further, the importation of common law and equitable rights into this country is limited by s. 3(1) of the Civil Law Act 1956, and precluded by s. 6 of the same Act. In addition, the maxim "He who comes to equity must come with clean hands" was not applicable. *(Datin Siti Hajar v. Murugasu* [1970] 2 MLJ 153; *United Malayan Banking Corporation Berhad v. Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 CLJ 146 @ 149).

[Judgment for plaintiff. Defendants to pay damages to plaintiff.]

Cases referred to:
Datin Siti Hajar v. Murugasu [1970] 2 MLJ 153
United Malayan Banking Corporation Berhad v. Pemungut Hasil Tanah, Kota Tinggi [1984] 1 CLJ (Rep) 51

Legislation referred to:
Civil Law Act 1956, ss. 3(1), 6
National Land Code 1965, ss. 282 to 288
Specific Relief Act 1950, s. 41

Other source referred to:
Halsbury's Laws of England Edn. 3 Vol. 38 at p. 739

For the plaintiff - Thara Singh Sidhu; M/s Thara Singh Sidhu
For the defendants - F.H.D' Cruz; M/s Tay Leong Siak & Co.

JUDGMENT

Wan Yahya J:

On 15 December 1981 the plaintiff who was desirous of carrying on his business as a second-hand goods dealer bought land No. 37 of town area 29 Bandar Malacca. Towards the rear of the plaintiff's left adjacent lot as one faces the road stands the house of the second defendant as well as a cluster of other houses. The house built by the 2nd defendant is maintained by payment of ground rent to the owner of that lot. The first defendant, the son of the second defendant, Ong Peck Seng, came to live with his father in that house some time in 1979 when he commenced to do the same business as the plaintiff. The defendant's house partly encroached on the plaintiff's land. However, as this part of the building had been demolished this matter no longer forms the issue in this case. Right in the centre of the plaintiff's land from the rear portion to the front main road there existed a path used by the first and second defendants as access to their house.

Some time after taking possession of his newly purchased lot the plaintiff with a view to commencing his second-hand dealer's business fenced the entire area but the fence was forcibly pulled down by the first defendant who continued to use the path for his vehicles access to his house. The plaintiff claims that the defendant threatened his workmen who were erecting the fence with the use of force. He therefore seeks this Court's remedy for a declaration that he is entitled to the exclusive possession and enjoyment of the land; an injunction to restrain the defendants whether by themselves or by their servants or agents from trespassing on the said land; an Order that the defendant do forthwith pull down and demolish the wooden shed erected on the plaintiff's land, damages and costs.

The defendants did not dispute the facts but disclaim that the plaintiff is entitled to the Orders he seeks for two reasons. Firstly, they contend that the plaintiff had failed to prove that their continued use of the plaintiff's land constitutes trespass. To establish trespass, according to them, the plaintiff must prove damages. Secondly, the defendants also claim that they have acquired an equitable right of way to use the path through unobstructed use of the same over some 40 years.

On the first line of defence, I find it difficult to respond to the suggestion that damages must be proved before the applicant succeed in his prayer for a declaratory order. Section 41 of the Specific Relief Act 1950 states in very clear terms that any interested person to any property may obtain an order against any person claiming or interested to deny his title or right of land. The plaintiff in this case is an undisputed registered owner of the land and all he need do, to successfully move this Court into issuing the orders prayed, is to show that the defendants' action amounted to a denial of his indivisible right over his property. It is unconscionable to accept that the defendants' continuing use of this passage, driving his vehicles up and down the plaintiff land, tearing down the fence and preventing the plaintiff from carrying on his proposed business can mean otherwise than a denial of the latter's right to enjoy a peaceful occupation of his own land. Trespass to land unlike criminal trespass is completed once a person wrongfully, albeit peaceably, intrudes into the land in the possession of another, even where no damage is done. Trespass to land covers all unlawful entry and includes taking possession, pulling down or destroying anything permanently fixed to the land. The following passage of what constitutes trespass to land is found in *Halsbury's Laws of England* Edn. 3 Vol. 38 at p. 739:

> Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, although no actual damage is done. A person trespasses upon land if he wrongfully sets foot on, or rides or drives over, it, or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or, it seems, if he erects or suffers to continue on his own land anything which invades the airspace of another, or if he discharges water from another's land, or sends filth or any injurious substance which has been collected by him on his own land on to another's land.

Even if damages need be proved, there is in my finding sufficient evidence of it in our present case. Tearing down fence, threatening workers engaged in erecting it and driving vehicles up and down right in the middle of another man's land and depriving the owner of his right to conduct his business on his land, in my opinion, constitute sufficient damage to the land owner.

The second line of defence relied upon by the defendants is one which his counsel briefly mentioned as equitable right. However, as he did not elaborate on the nature of the right his client is relying on, it is difficult for this Court to determine under which category of right or interest the defendants' claim would fall into. It is true that prior to 1965 rights of way could be acquired through easement, prescription, lost modern grant or by way of necessity but these common law and equitable rights previously procurable in this country are no longer available since the passing of s. 3(1) and 6 of the Civil Law Act, 1956 and the National Land Code, 1965. Section 3(1)of the Civil Law Act provides:

> Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall -
>
> (a) In West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on 7 day of April, 1956.
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

It is obvious that the above section is a saving provision intended to preserve the remedy for matters not provided for by statute. It is equally ostensible that these rights arising out of common law or the rules of equity will cease to function the moment parliament enacts the relevant legislation relating to comparable rights. This intention to preclude the continued importation of common law and equitable rights into this country is further substantiated in s. 6 of the Common Law which reads:

> Nothing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein.

In *Datin Siti Hajar v. Murugasu* [1970] 2 MLJ 153 Syed Agil Barakbah J went into elaborate discussion on the effect of this legislation on common law and equitable rights. Further authority is to be found in the Privy Council case of *United Malayan Banking Corporation Berhad v. Pemungut Hasil Tanah, Kota Tinggi* [1984] 1 CLJ (Rep) 51, [1984] 1 CLJ (Rep) 51 at 56 where their Lordships expressed the opinion on land tenure as follows:

> ...laws relating to the tenure of land must, applying the ordinary and natural meaning of the words, embrace all rules of law which govern the incidents of the tenure of land...

Parallel legislation on rights and interest incidental to land tenure has been expressly provided for in ss. 282 to 288 under Chapter 17 of the National Land Code by way of registration. Any such right was never registered by the defendant and therefore their claim under this limb must fail. In any event the 1st defendant's right of way commenced only after 1979.

A further argument based on the equitable maxim "He who comes to equity must come with clean hands" was raised by the Counsel. In my considered view it is the defendants rather than the plaintiff who appeared to have transgressed this equitable right. Their forceable insistence in using this path over another man's land when other access be it less convenient are available through their own landlord's land, does not in my opinion reflect conscionable or moral behaviour. Likewise the objection on this point fails.

There shall be an order in terms of prayer 1 and 2. Prayer 3 is rendered redundant by compliance prior to this hearing. I make no order thereon. Prayer 4 on damages has neither been raised nor argued to this Court's satisfaction. A claim of RM400 per month ground rental on a small piece of land is certainly exorbitant. To my mind, a sum of RM200 per month appears to be fairer and equitable.

The defendants shall pay to the plaintiff damages to be assessed on this sum for the period commencing two weeks from the date of registration of the land. i.e. 1 January 1982 until 9 March 1983 when an order of interim injunction was made by this Court.

The defendants shall also pay the cost of this suit.

Also found at [1985] 1 CLJ 478